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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. LINUS EKENE, Defendant and Appellant.	B201285 (Los Angeles County Super. Ct. No. LA026264)

APPEAL from a Judgment of the Superior Court of Los Angeles County. John S. Fisher, Judge. Affirmed.

Susan K. Keiser, under appointment by the Court of Appeal for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Margaret E. Maxwell, Supervising Deputy Attorney General, Robert David Breton, Deputy Attorney General, for Plaintiff and Respondent.

Defendant Linus Ekene appeals from his conviction for first degree murder (Pen. Code, § 187), with a true finding that he personally used a firearm in the commission of the offense (Pen. Code, § 12022.5, subd. (a)(1).)[1] He contends the trial court erred in refusing a continuance of the trial after the prosecution's case in order to permit him to determine whether to testify, and in failing to give a unanimity instruction. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

Defendant was charged in connection with the fatal shooting of Okon Nelson Offem at Offem's apartment after a dispute over a check that Offem had purportedly cashed for defendant. Defendant asserted self-defense, claiming that Offem came after him with a broken beer bottle. The information charged defendant with one count of murder (§ 187, subd. (a)), and that he personally used a firearm in the commission of the offense (§ 12022.5, subd. (a)(1)).

Henry Sakpoba testified at trial he was a friend of both defendant (who was also known as Wayne) and the victim. Sakpoba lived on Ostego Street in North Hollywood, and Offem lived in the apartment building next door. Sakpoba had observed that Offem did not smoke, and he drank Guinness beer.

On January 9, 1997, Offem came to Sakpoba's apartment, and Sakpoba observed that Offem had cuts on his fingers. Offem explained that he and defendant had gotten into a fight after an argument about a check. Offem told Sakpoba that defendant had threatened his life.

The next day Sakpoba spoke to Offem on the telephone and Offem told him that defendant and another man were on their way to Offem's apartment. Over the telephone, Sakpoba heard a knock on the door and heard defendant say, "Excuse me." Offem told Sakpoba that "they are here." Sakpoba told Offem not to open the door, and he heard Offem say, "Wayne, go away." Offem told Sakpoba, "I'm tired of Wayne bothering me,

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[1] All statutory references herein are to the Penal Code unless otherwise noted.

I'm going to go out there, open the door and fight him." Sakpoba pleaded with him not to open the door, but Offem hung up the telephone.

Sakpoba went next door to Offem's apartment, where he saw Offem lying in the doorway. A woman had taken off her jacket to cover him. Sakpoba shouted, "Call 911." Offem said, "I was shot."

David Solomon was friends with defendant at the time of the shooting and lived with defendant at a hotel. On the afternoon of January 9, 1997, Solomon saw that defendant had bruises and scratches on his face. Defendant told him that he had gone to Offem's house and gotten into a fight with him because Offem was not "forthcoming with him" about defendant's money. Defendant looked angry.

On January 10, 1997, Solomon spoke to defendant between 4:00 and 6:00 p.m. Defendant told Solomon he was going to see Offem to rough him up a bit and get his money. Solomon told him not to go. Between 8:00 and 10:00 p.m., defendant called Solomon and said, "there's trouble." Defendant told Solomon that Offem had been shot, they should pack up their things, and drive to Texas.

When he picked Solomon up, defendant explained that defendant had gone to Offem's house with an African American man. When they got there, Offem had a beer in his hand, and asked him to leave. Offem broke the bottle on the wall and came after defendant, and the African American pulled out a gun and shot Offem. Solomon claimed he had never seen defendant with a gun before.

Defendant dropped Solomon off at a friend's house.

Udoma Obi was a friend of both defendant and the victim at the time of the shooting. Obi and the victim lived in the same apartment complex; Obi lived on the floor directly above the victim's unit. On the night of January 10, 1997, defendant buzzed Obi's apartment number on the intercom at the apartment complex, and asked if Obi had seen Offem. Obi said he had not and let defendant in. At trial, Obi testified he did not hear another male voice over the intercom. However, when defendant came up to Obi's apartment, he was with another African American male. Defendant was wearing baggy clothes, and Obi could not tell if defendant had a weapon on him. He did not know the

other man, who was wearing very tight clothing. Obi believed he would have been able to see if the man was carrying a weapon.

Defendant told Obi that he had given the victim a check to cash, that the check had cleared, but Offem had not given him the money. Defendant was very upset. Obi asked defendant to let him negotiate. Obi's phone rang, and it was Offem, who had overhead defendant's voice in Obi's apartment. Defendant took the phone and spoke to Offem. Obi observed that defendant was very emotional and was yelling. Defendant hung up the phone and said, "somebody is going to get killed," and left Obi's apartment. Obi called Offem and told him that defendant was on his way.

Obi heard banging, and then he heard a gunshot. Obi went outside and saw the victim collapsed in front of the apartment. Offem told him that defendant had shot him.

Margaret Moss, a police detective with the Los Angeles Police Department, took photographs of the crime scene, one of which depicted a package of cigarettes at the crime scene. She did not observe any broken glass or beer bottles in the hallway, nor did she smell any spilled alcohol. Police retrieved a Hennessy cognac cork and a cognac bottle from near the victim's doorway. There was another Hennessy bottle inside the apartment.

The coroner's office testified the victim died from a gunshot wound to the chest. The tip of the barrel of the gun was within one and one-half feet of the victim at the time of the shooting as evidenced by stippling around the bullet hole. The victim had a blood alcohol content of .127 when he was admitted to the hospital after the shooting.

On September 20, 2006, defendant was arrested in Utah and gave a false name.

Ted Braga, an investigator for the public defender's office testified for the defense that he interviewed Sakpoba. Sakpoba told him that he was a friend of the victim, and that on the night of the incident he heard a knock on the victim's door. Offem did not describe the knock as being excessively loud. Offem told Sakpoba that he was not afraid of defendant and could handle the situation. Offem stated that he was tired of defendant and was going to open the door and fight with defendant.

Braga also interviewed Solomon, who told him that defendant had given a check to Offem, who was going to give defendant money. On the day of the incident, defendant

told Solomon he was going to Offem's to get his money. He did not say he was going to Offem's to scare him or to rough him up. When defendant called Solomon after the shooting, he did not say "I shot him," or "I'm in trouble." Defendant told Solomon that Offem had been drinking. Offem told defendant that if he had come to hassle him about the money, he should forget it and leave. Defendant told him Offem grabbed a beer bottle and went for defendant, and the African American man with defendant shot Offem.

Defendant testified that on January 9, 1997, he was living with Solomon. Previously, he had given Offem a check to cash that a friend named Ralph had given him; he knew Offem would cash the check. He went to Offem's house to collect the cash because he knew the check had cleared. However, Offem got very angry with defendant, and hit him on the mouth. Defendant left.

Defendant testified that Ralph thought defendant was withholding the money. Defendant suggested that Ralph go with him to Offem's house so that Offem could explain that defendant was not withholding the money. Defendant thought Obi could mediate, so he and Ralph went to Offem's apartment complex and rang Obi's buzzer. He admitted that he had previously had a falling out with Obi over a girl, so going to see Obi was a last resort. Obi did not want to mediate. Defendant denied that he said "somebody is going to get killed tonight."

Defendant and Ralph went downstairs and knocked on Offem's door. Defendant denied kicking the door. Offem opened the door with a Hennessy bottle in his hand. He looked very angry, and had the bottled raised. Defendant was afraid, so he ran down the hall. Ralph was behind defendant, and Offem got close to Ralph and was about to hit him with the bottle. Ralph pulled out a gun and shot Offem. Defendant did not know that Ralph had a gun, and he did not see whether Offem was shot. They left the apartment complex, and he dropped Ralph off at Denny's. He called Solomon and told him what happened. Defendant denied threatening Offem, and denied that the check was fraudulent.

The prosecution proceeded on three theories: first degree premeditated murder, felony murder, and natural and probable consequences (aiding and abetting). The jury

found defendant guilty of murder in the first degree and that he personally used a firearm in the commission of the crime. The trial court sentenced defendant to 26 years to life.

DISCUSSION

I. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN REFUSING TO GRANT A CONTINUANCE.

Defendant contends the trial court violated his Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel by denying him the opportunity to consult with counsel before deciding whether to testify. He argues the record demonstrates he expressed his need to consult with his counsel, who he contends had not completely advised him on his right not to testify, and the court without justification accused him of undue delay. We disagree.

A. Factual Background.

Near the end of the prosecution case, defense counsel stated that she intended to call only one witness, Ted Braga, to establish the prior inconsistent statements of certain witnesses; she indicated that she might possibly call defendant to testify. After the prosecution rested, the court asked the jury to return on Thursday, July 5, 2007, but told counsel that they would review jury instructions the next day. The court told defense counsel that by Thursday defendant should know whether he would testify.

The next court day, July 3, 2007, the parties discussed jury instructions. On July 5, 2007, the defense called Braga to testify. At the conclusion of Braga's testimony, the court stated it needed a "short logistical break," and defense counsel advised the court that she could talk to defendant about whether he wanted to testify if the prosecution stepped out for a minute. After a brief recess, the court asked counsel if there were any other witnesses before the court addressed "defendant's situation." Defendant and his counsel conferred off the record. The following colloquy occurred:

THE COURT: "Mr. Ekene, it's now your turn, if you want."

DEFENSE COUNSEL: [The court] wants an answer because the jury is waiting and we're waiting to proceed on and finish up and stuff."

THE COURT: "What do you want to do, Sir? Listen to me now. You have a right to testify and you have a right not to testify. So it's your call. What do you want to do?"

DEFENDANT: "If I could have some time."

THE COURT: "No. We've had a long time. We're ready to go now, and you have to make a decision. And if I don't hear that you're going to testify, and I'm presuming you are telling me you are not, because obviously we cannot force you to, and so I will deem that you do not want to testify. So I just – we can't wait around forever here. We cannot.

All right. While he's thinking, you have talked to him about all the goods and bads?

DEFENSE COUNSEL: "Oh, yeah."

THE COURT: "The ups and the downs, the pros and the cons?"

DEFENSE COUNSEL: "Oh, yeah."

THE COURT: "And you've given him whatever advice you have given him?"

DEFENSE COUNSEL: "I have."

THE COURT: "And I assume you've talked to him about the potential long before today?"

DEFENSE COUNSEL: "Absolutely, all along."

THE COURT: "Mr. Ekene, do you want to testify?"

DEFENDANT: "I will testify."

. . .

DEFENSE COUNSEL: "Linus, you can change your mind. You can change your mind, Linus."

DEFENDANT: "We hardly talked."

DEFENSE COUNSEL: "I talked to him about his. You know my position on this. We've talked a million times about this. Nothing has ever changed about my position."

DEFENDANT: "Yes. I write down what I wanted to show you, but I didn't get to tell you."

DEFENSE COUNSEL: "I've read your statement."

DEFENDANT: "You didn't read all of it."

DEFENSE COUNSEL: "I've read everything you've given to me, Linus. Don't do this."

THE COURT: "Okay, we're ready."

DEFENDANT: "If I can take a recess, let's talk and I'll show you."

THE COURT: "No, no, Mr. Ekene. Don't play the game with me now."

DEFENDANT: "I'm not."

THE COURT: "Yes, you are. I've been doing this long enough, and you are. You've been in jail and you've been thinking about this, obviously, for a long time, and you can't equivocate now like you've done in the past. So you're going to make a decision, and you're going to get up there and answer the questions if that's what you want. But you don't have to. Nobody is forcing you to. And, apparently, your lawyer is telling you, it's her advice that you not take the stand. So it's ultimately your call. It's your life. You've told me you want to take the stand, so we're ready for the jury."

DEFENSE COUNSEL: "Are you sure of this, Mr. Ekene? I'm giving you one last shot here. It's against my advice."

DEFENDANT: "Yes. I still wanted to ask you something, but I didn't get to. I wanted to hear you answer how you're going to treat those points."

THE COURT: "Mr. Ekene, no. Mr. Ekene, there's always going to be something to talk about."

DEFENDANT: "Oh, no."

THE COURT: "Yes there is. She has said, and I believe her, that – wait, listen to me – that you've talked about everything. So that's it. Okay. So we'll bring in the jury."

DEFENSE COUNSEL: "Bad decision. You have one shot at it right now to get off the stand and rest, and let me do my job."

DEFENDANT: "I'll take the stand."

B. Discussion.

In *Brooks v. Tennessee* (1972) 406 U.S. 605 (*Brooks*), the Supreme Court invalidated a Tennessee statute that required a defendant to testify as the first witness during the presentation of his or her defense. (*Id.* at p. 611.) The *Brooks* court noted that

the rule was based on the ancient practice of sequestering witnesses to avoid tainting their testimony. Under modern rules, because a criminal defendant was entitled to be present at trial, the rule was modified to require the defendant to testify first. (*Id.* at p. 607.)

Brooks noted the defendant's decision whether to take the stand was of the utmost importance because the defendant, in making that decision, was required to balance the advantages of being a witness against the hazards of cross-examination and impeachment. (*Id.* at p. 608.) "'It must often be a very serious question with the accused and his counsel whether he shall be placed upon the stand as a witness, and subjected to the hazard of cross-examination . . .'" and one which cannot be a question that he is not required to decide until a full survey of all the case, as developed by the state, and met by witnesses on his own behalf. "'Whether he shall testify or not; if so, at what stage in the progress of the defense, are equally submitted to the free and unrestricted choice of one accused of crime, and are in the very nature of things beyond the control or direction of the presiding judge.'" (*Id.* at p. 608, quoting *Bell v. State* (1889) 66 Miss. 192, 194.) "Although a defendant will usually have some idea of the strength of his evidence, he cannot be absolutely certain that his witnesses will testify as expected or that they will be effective on the stand. . . . [¶] . . . Because of these uncertainties, a defendant may not know at the close of the State's case whether his own testimony will be necessary or even helpful to his cause." (*Id.* at pp. 609-610.) The Tennessee statute requiring the defendant to testify first impermissibly burdened on the defendant's otherwise unconditional right not to take the stand, and therefore violated the Fifth Amendment. (*Id.* at pp. 611-612.)

In *People v. Cuccia* (2002) 97 Cal.App.4th 785 (*Cuccia*), the court told the parties at the outset of trial it did not want to be inconvenienced by waiting for witnesses, and that it would consider a party's case rested if there were any delays. After the defendant had presented several witnesses, and defendant's next witness could not be located, the court asked the defendant in the presence of the jury whether he intended to testify. Without making an objection, defendant took the stand. During a recess in the middle of closing arguments, defendant moved for a mistrial, citing the court's query concerning his decision

to testify. The court rejected defendant's motion, noting that defendant's counsel had argued in opening that defendant would take the stand. (*Id.* at p. 791.)

Cuccia found the trial court's ultimatum to defendant that he rest his case or testify was an abuse of discretion because the missing witness incident occurred in the middle of the afternoon, there was no showing that defendant had not been diligent in procuring his witnesses, and the missing witness appeared the next day; further, a brief continuance would have permitted the defendant to present other witnesses before determining whether he wanted to testify. Nonetheless, the error was harmless because defendant's testimony was the only evidence on certain issues and was necessary to defend against some of the charges against him. (*Cuccia, supra,* at pp. 791-792.)

Here, we find no abuse of discretion. The record demonstrates that defendant was fully advised of his right to choose whether to take the stand and testify on his own. This advisement had been ongoing, as counsel stated she had discussed the matter with him numerous times. Defendant was well aware of how the trial testimony had shaped up, and the substance of his witness's testimony. His last-minute equivocation about testifying does nothing to change this, but merely indicates that he was, at the moment of decision, still unsure. There is no evidence he was bullied; on the contrary, his counsel consistently advised him against testifying and the court was solicitous of his needs.

Further, defendant cannot demonstrate prejudice. Defendant's testimony largely duplicated testimony already given, such as Solomon's account of defendant's statements to him about the shooting, Obi's testimony about the encounter at his apartment, and Sakpoba's version of events. There was very strong evidence of defendant's guilt: i.e., his anger at Offem over the check; his statements that he was going to kill somebody; his confrontation with the victim, overheard by Sakpoba; and his flight from the state after the crime. Thus, even assuming the trial court abused its discretion in refusing to grant defendant a five to ten minute continuance to evaluate his decision to testify, any error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18; *People v. Cuccia, supra,* 97 Cal.App.4th at p. 791.)

II. NO ERROR IN FAILURE TO GIVE UNANIMITY INSTRUCTION.

Defendant contends that the trial court erred in failing, sua sponte, to give a unanimity instruction because the prosecution presented multiple, different acts by which it alleged he committed the crime of first degree murder. We disagree.

A. Factual Background.

At trial, the prosecution proceeded on a theory of felony murder, first degree murder, and aider and abettor liability. The court instructed the jury with CALCRIM No. 3550 that its "verdict on each count and any special findings must be unanimous. This means that, to return a verdict, all of you must agree to it." The jury was instructed that they had been given alternative theories of liability, namely, express malice and felony murder (based on robbery or burglary), and in particular was admonished that "[y]ou may not find the defendant guilty of murder unless all of you agree that the People have provided that the defendant committed murder under at least one of these theories. You do not all need to agree on the same theory." The jury found defendant guilty of first degree murder and that he personally used a firearm in the commission of the offense.

B. Discussion.

Jurors in a criminal case must unanimously agree the defendant is criminally responsible for "one discrete criminal event." (*People v. Thompson* (1995) 36 Cal.App.4th 843, 850.) Where the evidence supports more than one discrete crime, either the prosecution must elect among the crimes or the trial court must require the jury to agree on the same criminal act. (*People v. Russo* (2001) 25 Cal.4th 1124, 1132.) The unanimity requirement is intended to eliminate the danger the defendant will be convicted although the jury does not agree on the single offense the defendant committed. (*Ibid.*) "The [unanimity] instruction is designed in part to prevent the jury from amalgamating evidence of multiple offenses, no one of which has been proved beyond a reasonable doubt, in order to conclude beyond a reasonable doubt that a defendant must have done *something* sufficient to convict on one count." (*People v. Deletto* (1983) 147 Cal.App.3d 458, 472.) If the prosecution does not elect between crimes, the trial court has a sua sponte duty to give a unanimity instruction. (*People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534.)

Any error is evaluated under the *Chapman* standard. (*People v. Thompson, supra,* 36 Cal.App.4th at p. 853.)

However, where there is but one discrete act that leaves room for disagreement on how the crime was committed or the precise nature of defendant's role, the jury need not unanimously agree upon the theory under which the defendant is guilty. (*People v. Russo, supra,* 25 Cal.4th at p. 1132.) "[T]pyical examples include the rule that, to convict a defendant of first degree murder, the jury must unanimously agree on guilt of a specific murder but need not agree on a theory of premeditation or felony murder [citation], and the rule that the jury need not agree on whether the defendant was guilty as the direct perpetrator or as an aider and abettor as long as it agreed on a specific crime [citation]." (*Id.* at p. 1133; *People v. Beardslee* (1991) 53 Cal.3d 68, 92 [jury may convict defendant of first degree murder without making unanimous choice of theory]; *People v. Jenkins* (2000) 22 Cal.4th 900, 1024-1025 [jury need not unanimously agree whether defendant is aider and abettor or perpetrator].)

Here, no unanimity instruction was required because the prosecution proceeded on different theories of first degree murder, and that the one act (killing the victim) constituted, based upon the jury's conclusion as to defendant's mental state, either felony murder, or first degree murder, or permitted a finding that defendant was guilty as an aider and abettor. The two theories of direct liability, felony murder and first-degree murder, both require that the defendant act with malice in perpetrating the killing. Under the felony murder doctrine, malice is imputed based upon a predicate felony that is inherently dangerous to human life. (*People v. Hansen* (1994) 9 Cal.4th 300, 308.) Felony murder is of the first degree if the predicate felony (such as robbery) is enumerated in section 189. First degree murder requires that defendant act with express malice, namely, a deliberate, willful, premeditated act. (§187, subd. (a); *People v. Hanson, supra,* 9 Cal.4th 4 at pp. 307-308.) The one act of killing supports both theories of murder.

Nonetheless, relying on *People v. Davis* (2005) 36 Cal.4th 510, defendant argues there was more than one crime, namely the underlying robbery and the murder. In *Davis,* the court rejected the prosecution's contention that the two acts of robbery (taking a car and

taking jewelry) formed one continuous transaction for purposes of determining whether a unanimity instruction was required. (*Id.* at p. 561.) There, the trial court's failure to give a unanimity instruction was prejudicial because the evidence disclosed two distinct acts of robbery, and it was impossible to ascertain from the record whether some jurors found defendant guilty of robbery based upon taking the car, and other jurors found guilt based upon taking the jewelry. (*Ibid.*) *Davis* does not apply here because there was only one act for purposes of the unanimity instruction: the shooting of the victim. The jury was permitted to choose between two theories of first degree murder based upon defendant's mental state in committing the single act.[2] Defendant's argument, in an attempt to create two discrete acts for the purpose of the unanimity instruction, improperly attempts to divide felony murder into its components of robbery and murder.

DISPOSITION

The judgment of the superior court is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.

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[2] On this record, the jury did not convict on a theory of aiding and abetting, but found defendant was the perpetrator, as evidenced by the personal use of a firearm finding.